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No. 91-902

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

ROBERT P. CASEY, ALLAN S. NOONAN, and ERNEST PREATE, JR., personally and in their official capacities,

Cross-Petitioners,

—v.—

PLANNED PARENTHOOD OF SOUTHEASTERN PENNSYLVANIA, REPRODUCTIVE HEALTH AND COUNSELING CENTER, WOMEN'S HEALTH SERVICES, INC., WOMEN'S SUBURBAN CLINIC, ALLENTOWN WOMEN'S CENTER, and THOMAS ALLEN, M.D., on behalf of himself and all others similarly situated,

Cross-Respondents.

BRIEF FOR CROSS-RESPONDENTS ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Does *Roe v. Wade*, 410 U.S. 113 (1973), remain the law of the land, thereby requiring this Court to hold that Pennsylvania's husband notification requirement violates a woman's right of privacy?

2. Is the husband notification requirement unconstitutional on alternative grounds?

PARTIES TO THE PROCEEDING

The parties to the instant proceeding are set forth in the caption on the cover of this response.

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the constitutional and statutory provisions listed in the instant Petition for Certiorari at 3, the Fourteenth Amendment's Equal Protection Clause provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE[1]

The husband notification provision in Section 3209 of the Act[2] is the only provision of the 1988 and 1989 amendments to the Pennsylvania Abortion Control Act that the Court of Appeals for the Third Circuit held unconstitutional. This harsh provision, which requires that a married woman notify her husband of her abortion decision prior to obtaining the procedure, is unparalleled in Pennsylvania law.[3] By

1 Cross-Respondents incorporate the statement of the case presented in their Petition for a Writ of Certiorari at 2-5, *Planned Parenthood v. Casey*, No. 91-744 (filed Nov. 7, 1991) [hereinafter "Cert. Pet."]. Citations to the Appendix to the Cert. Pet. will be cited as "(____a)." To avoid confusion, the Commonwealth's Petition for Certiorari in *Casey v. Planned Parenthood*, No. 91-902 (filed Dec. 9, 1991), will be referred to as the "Cross-Petition for Certiorari" [hereinafter "Cross-Pet."]. Citations to the Appendix to the Cross-Pet. will be cited as "(CA ____a)."

2 18 Pa. Cons. Stat. Ann. § 3209 (1983 and Supp. 1991) appears in full at (300a-302a).

3 As the District Court found, Pennsylvania law does not require a husband to notify his wife about any of the many medical procedures that affect his capacity to have children within marriage. (CA 298a-299a). Similarly, the Commonwealth does not require a woman to notify her husband of other surgical procedures, such as a hysterectomy, which would affect her capacity to have children. (CA 299a).

express operation of the statute, a woman whose husband threatens to publicize her intent to have an abortion, inflicts psychological or economic intimidation on her or her children, or punishes her children with repeated and extreme physical violence must nevertheless involve him in her private decision to have an abortion.

Although the Act purports to exempt battered women and survivors of marital rape from the notification requirement, insurmountable procedural obstacles prevent women from taking advantage of its limited exceptions. As the District Court found, only rarely will a woman who has been physically abused be prepared to admit that her husband has abused her, discuss the abuse with others, and acknowledge the abuse on a written form, or in the case of marital rape, report the abuse to law enforcement officials. (CA 292a-302a). Yet Pennsylvania requires a woman to do just that in order to qualify for a waiver of notification under the law's narrow exemptions. As a result, even a battered woman or survivor of marital rape may be forced to notify her husband of her abortion choice.

Relying on the extensive trial testimony and factual findings[4] detailing the economic pressure, psychological coercion, and often terrifying physical

4 The Commonwealth has not challenged any of the 387 factual findings of the District Court, including those findings that highlight the harmful effects of the husband notification provision.

force to which some husbands will resort in order to interfere with their wives' reproductive decisions, (CA 66a-68a), the Court of Appeals held that the husband notification requirement imposes an "undue burden" on a woman's abortion decision. (CA 70a).

The Court of Appeals then held unconstitutional the husband notification requirement because none of the state's asserted interests—promoting the integrity of the marital relationship, protecting the husband's interest in the fetus, or protecting his interest in having children within marriage—are sufficiently compelling to justify this onerous and punitive restriction on a woman's right to choose abortion.[5]

ARGUMENT

Although this Court must affirm the Court of Appeals' judgment that the husband notification provision is unconstitutional, Cross-Respondents join the Commonwealth in seeking this Court's review of the judgment. The appellate court erred in choosing to apply Justice O'Connor's "undue burden" test, *City of Akron v. Akron Center for Reproductive Health, Inc.*, 462 U.S. 416, 453 (1983) (O'Connor, J., dissenting), to measure the constitutionality of the statute. Had it properly read this Court's recent decisions in *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989), and *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990), the Court of

5 Although fully briefed by the parties, the Court of Appeals did not address whether mandated husband notification violates a woman's rights to marital privacy and equal protection guaranteed by the Fourteenth Amendment. *See* discussion *infra* at 8-12.

Appeals would have concluded that this Court upheld as constitutional the challenged restrictions without making any substantial change in the law of abortion. (CA 364a-371a). In *Webster*, Justice O'Connor measured and upheld Missouri's viability testing requirement under the strict scrutiny standard of *Roe v. Wade*, 410 U.S. 113 (1973), *Akron*, and *Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747 (1986). *Webster*, 492 U.S. at 530 (O'Connor, J., concurring). Although the parental notification with bypass provision at issue in *Hodgson* was upheld as constitutional under a less protective standard long applicable to young women,[6] even Justice O'Connor recognized that when similar provisions interfere with the rights of mature women, they are unconstitutional. *Hodgson*, 110 S. Ct. at 2944 n.35 (Stevens, J., and O'Connor, J., concurring). *See also Rust v. Sullivan*, 111 S. Ct. 1759, 1777 (1991).

Equally important, the Court of Appeals' reliance on *Marks v. United States*, 430 U.S. 188 (1977), is misplaced. As the Court of Appeals for the District of Columbia Circuit *en banc* recently found:

> When . . . one opinion supporting the judgment does not fit entirely within the broader circle drawn by the others, *Marks* is problematic. If applied in situations where the various opinions supporting the judgment are mutually exclusive, *Marks* will turn a single opinion that lacks majority support into national law. When eight of nine Justices do not subscribe to a given approach to a legal question, it surely cannot be

6 In contrast, Minnesota's two-parent notification requirement was invalidated as an unwarranted interference with marital privacy. *Hodgson*, 110 S. Ct. at 2946.

proper to endow that approach with controlling force, no matter how persuasive it may be.

King v. Palmer, No. 89-7027, slip op. at 20 (D.C. Cir. Dec. 13, 1991)(*en banc*). *King v. Palmer* makes plain that the Court of Appeals' application of *Marks* is anything but "straightforward" or "routine." *See* Brief in Opposition to Petition for Writ of Certiorari at 22-23, *Planned Parenthood v. Casey*, No. 91-744 (filed Dec. 9, 1991).

Accordingly, this Court must reaffirm that the strict scrutiny standard of *Roe v. Wade* remains the law of the land, Cert. Pet. at 5-13, and conclude that, under that test, the husband notification provision as well as the other challenged provisions of the Act—the 24-hour mandated delay, biased patient counseling, parental informed consent, onerous reporting mandates, and restrictive definition of medical emergency (289a-304a)—are unconstitutional.[7]

In *Roe v. Wade*, this Court found unconstitutional a Texas statute banning abortion. In that decision, however, this Court did far more than prohibit states from sending women to the back alleys for their medical care: it established that the government may not interfere with a woman's fundamental right to make private decisions about abortion or childbirth. Requiring more than mere "rationality"

7 Cross-Respondents seek review of the Court of Appeals' judgment on the husband notification provision, despite the favorable ruling, because the legal issue—whether this Court continues to adhere to the strict scrutiny standard of *Roe v. Wade*—is the same as that raised in the Cert. Pet. at i. This Court will be best able to resolve this essential question with all of the challenged provisions and the complete record of the case before it.

or the absence of an "undue burden," this Court found that state laws that intrude upon private childbearing decisions must be examined under the most exacting standard of scrutiny. Thus, only laws that are necessary and narrowly tailored to serve the most compelling state interests pass constitutional muster. 410 U.S. at 155.[8] Applying this stringent standard, this Court found unconstitutional provisions nearly identical to some of those at issue in this case. *See, e.g., Akron*, 462 U.S. at 449-51 (24-hour mandatory delay); *Thornburgh*, 476 U.S. at 759-68 (biased patient counseling, reporting requirements). Indeed, the Court of Appeals acknowledged, and the District Court found, that the Pennsylvania law is unconstitutional under the strict scrutiny standard of *Roe v. Wade*.[9]

Moreover, as the Commonwealth concedes, this Court's recent and fragmented opinions regarding abortion[10] have given conflicting signals regarding the appropriate standard of review, engendering con-

8 This Court also found that the state's interest in maternal health becomes compelling at the beginning of the second trimester of pregnancy. After the point of fetal viability, the state's interest in the potential life of a fetus is also sufficiently compelling to meet these high standards, but only so long as a woman remains free to protect her own life or health. *Roe*, 410 U.S. at 163-64.

9 *See* (CA 30a); (CA 305a). A majority of the Court of Appeals correctly held that the husband notification provision was not justified by a "compelling state interest." (CA 71a-74a). Even Judge Alito, in his dissenting opinion, acknowledged that this provision could not survive strict scrutiny. (CA 87a).

10 *Webster v. Reproductive Health Servs.*, 492 U.S. 490 (1989); *Hodgson v. Minnesota*, 110 S. Ct. 2926 (1990); *Ohio v. Akron Center for Reproductive Health, Inc.*, 110 S. Ct. 2972 (1990); *Rust v. Sullivan*, 111 S. Ct. 1759 (1991).

fusion not only among the lower federal courts, but also in state legislatures and Congress. *See* Cross-Pet. at 24. The parties therefore agree that this Court must expeditiously take this case and decide whether women's reproductive decisions are worthy of the highest level of constitutional protection.

Reaffirmation of *Roe*'s strict scrutiny analysis remains the best course for this Court to protect women's rights to liberty and equality guaranteed by the Bill of Rights. By adopting a new, less protective standard—as advocated by the Commonwealth—this Court would not only overrule *Roe*,[11] but would also jeopardize the lives and health of millions of American women who rely on these fundamental constitutional guarantees.

However, should this Court overrule *Roe v. Wade* and uphold the husband notification provision under a new, diluted doctrine of reproductive privacy,[12] it must still affirm the Court of Appeals' judgment on two alternative grounds. Section 3209 violates both

11 In both its Response and Cross-Petition, the Commonwealth seeks to reframe the questions presented so that it does not overtly question the continuing validity of *Roe v. Wade*. Nevertheless, by urging this Court to replace *Roe*'s standard of strict scrutiny with the less protective "undue burden" or "rational basis" tests, *see* Cross-Pet. at 24-25, the Commonwealth seeks the overruling of *Roe v. Wade*. Cross-Petitioners cannot avoid the import of their request by obfuscating or reframing the question to satisfy their political agenda.

12 Because Cross-Petitioners ask this Court to reaffirm as fundamental the right to choose abortion or childbirth, they do not address herein why the husband notification provision also fails to pass constitutional review under the "undue burden" and "rational basis" tests. These issues will be fully addressed in the briefs on the merits should this Court accept the cases for review.

the Fourteenth Amendment's right to marital privacy and its equal protection guarantees. The presence of these important federal questions—which have not been, but should be, settled by this Court, *see* Sup. Ct. R. 10.1(c)—warrants the granting of certiorari.[13]

This Court has held that the marital relationship is protected by a "right of privacy older than the Bill of Rights." *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965). It is well settled that "freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment." *Cleveland Bd. of Educ. v. La Fleur*, 414 U.S. 632, 639-40 (1974); *Moore v. City of East Cleveland*, 431 U.S. 494, 499 (1977) (plurality). *See also Zablocki v. Redhail*, 434 U.S. 374, 383-85 (1978). Moreover, it is undisputed that "the married couple has a well-recognized interest in protecting the sanctity of their communications from undue interference by the State." *Hodgson*, 110 S. Ct. at 2944 n.33 (Stevens, J.).

Section 3209 flies in the face of these long-established principles. The Act injects government into the private discussions between a husband and wife, compelling a married woman to reveal intimate information that she has chosen to keep private.[14] This disclosure is mandated even when a husband

13 By including consideration of these alternatives, the questions presented by Cross-Respondents more fully articulate the questions that must be addressed by this Court.

14 The intrusion is particularly deplorable in light of this Court's recognition of the strong "individual interest in avoiding disclosure of personal matters." *Whalen v. Roe*, 429 U.S. 589, 599 (1977). *See also* (CA 67a-68a).

would publicize his wife's intent to have an abortion, psychologically abuse her, use economic pressure to intimidate her, or inflict physical as well as psychological harm on their children. As the District Court found, "[f]orced husband notification . . . would foster negative and abusive communication and increase the likelihood that a woman would be seriously battered." (CA 302a).[15]

Although "full communication among all members of a family" may be desirable,

> such communication may not be decreed by the State. The State has no more interest in requiring all family members to talk with one another than it has in requiring certain of them to live together . . . [A] state interest in . . . making the "private realm of family life" conform to some state-designed ideal is not a legitimate state interest at all.

Hodgson, 110 S. Ct. at 2946 (citations omitted). The Constitution must not sanction this egregious state

15 Finding that "the number of different situations in which women may reasonably fear dire consequences from notifying their husbands is potentially limitless," the Court of Appeals enumerated some of the women who are are likely to suffer from mandated notification:

> women who reasonably fear retaliatory psychological abuse; women who reasonably fear retaliatory physical or psychological abuse of their children; women who are separated following a failed marriage relationship and for whom renewal of contact may produce severe emotional distress; women whose husbands have serious health problems and who reasonably fear that notification will be health threatening; and women whose marriages are severely troubled and who reasonably fear that notice will precipitate the demise of the marital relationship.

(CA 70a).

intrusion in the name of "marital integrity." Open and caring dialogue between a husband and wife must arise out of free choice—it cannot be compelled by the government.

In addition, Section 3209 violates the Fourteenth Amendment's equal protection guarantee by discriminating between married women and men. Pennsylvania law requires a married woman to notify her husband of her abortion choice, but does not require a married man to notify his wife before undergoing a medical procedure, such as sterilization, prostate operations, or chemotherapy, that would "affect the capacity of males to have children within the marriage." (CA 298a-299a). Unlike a married woman, a married man is free to exercise his right of reproductive choice without compelled notification of his wife.

Since Section 3209 imposes obligations only on married women, while conferring rights only to married men, the Commonwealth must at least demonstrate an "exceedingly persuasive justification" for this gender-based classification. *Mississippi Univ. for Women v. Hogan*, 458 U.S. 718, 724 (1982) (citations omitted). *See also Craig v. Boren*, 429 U.S. 190, 197 (1976). Yet, because the husband notification provision also intrudes on the fundamental rights to marital and informational privacy protected by the Fourteenth Amendment, *see supra* at 8-11, the highest standard of scrutiny is required. Therefore, the Commonwealth must demonstrate that the forced notification provision is narrowly tailored to serve a compelling state interest. *See Plyler v. Doe*, 457 U.S. 202, 216-17 & n.15 (1982); *Zablocki*, 434 U.S. at 388; *Skinner ex rel. Williamson v. Oklahoma*, 316 U.S. 535, 541 (1944).

The Commonwealth is unable to demonstrate that its interest in marital integrity, or in protecting a husband's interest in the fetus, or his interest in having children within marriage, is a persuasive, let alone compelling, justification for imposing these restrictions on women alone. *Planned Parenthood of Central Missouri v. Danforth*, 428 U.S. 52, 67-72 (1976); (CA 420a-421a). Rather, as the record in this case so powerfully demonstrates, the statute merely places the Commonwealth's imprimatur on the discriminatory and stereotypical view that a woman cannot be trusted to make independent life choices without the involvement, and often coercive influence, of her husband. Section 3209 therefore violates the Equal Protection Clause. *See Hogan*, 458 U.S. at 725.

CONCLUSION

In 1986, when reviewing a prior version of Pennsylvania's Abortion Control Act, this Court reaffirmed *Roe v. Wade* and found the Act's onerous provisions unconstitutional. *Thornburgh*, 476 U.S. at 759. Now, this nearly identical case presents this Court with the opportunity once again to profess its commitment to women's fundamental constitutional rights. Cross-Respondents therefore ask that the writ of certiorari be granted: only then will American women know whether they continue to be guaranteed this Court's promise of liberty, dignity, and equality.

Respectfully submitted,

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